

In the present case, . . . Claimant was performing the obligations of the job at the time he fell. He was walking around the machine he was working on in order to continue operating the machine. He had to get around the machine quickly, because he did not want to waste any material, which had already happened once that day. Even if Claimant's right knee did play a role in causing Claimant's fall, as alleged by Respondent, that fact alone does not make the fall strictly the result of a personal condition of Claimant. Rather, Claimant had to climb up on the machine and then step back down off of the machine onto a rail before walking a few steps and then falling. If Claimant's right knee did "give out" or contribute to the fall, it likely did so because of Claimant's work activity of climbing down off of the machine, which Claimant said caused immediate pain in his right knee.

The Court finds that Claimant's May 17, 2014, fall and resulting left shoulder injuries arose out of and in the course of Claimant's employment with Respondent and that Claimant's May 17, 2014, fall was the prevailing factor causing his left shoulder injuries. As a result, Dr. Osland is the authorized treating physician for Claimant's left shoulder injuries, and Dr. Osland's medical bills related to Claimant's left shoulder injuries are ordered paid as authorized medical treatment pursuant to the Kansas Fee Schedule. Respondent is also ordered to pay weekly temporary total disability benefits at a rate of \$450.70 from June 19, 2014, through November 13, 2014.

Regarding Claimant's request for treatment of his right knee related to his May 17, 2014, fall, the Court exercises its authority pursuant to K.S.A. 44-516 and appoints **Dr. Pat Do** as a neutral physician to do an independent medical examination (IME). Dr. Do is requested to offer opinions as to diagnosis, causation, including prevailing factor, and treatment recommendations, if any.¹

Respondent asserts claimant's accident and injuries were caused by his preexisting right knee condition, a personal condition. Respondent relies on K.S.A. 2013 Supp. 44-508(f)(3)(A)(iii), which provides an accident or injury arising from a personal risk does not arise out of and in the course of employment.

Claimant asks the preliminary hearing Order be affirmed.

The sole issue is: did claimant prove he sustained a left shoulder injury by accident arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

The ALJ's Order sets out detailed and accurate findings of fact. The undersigned Board Member adopts the ALJ's findings of fact as his own, but notes the following:

Claimant indicated that in the 1980s, he had a torn meniscus in his right knee. His right knee was drained, he was off work three or four days and was on light duty for four to six weeks. After that, claimant's right knee would occasionally stiffen up and he would place an ice pack on it.

In June or July 2013, claimant began learning a new job operating a sheet extrusion machine when his right knee condition flared up. He worked at his normal job, but also spent short periods of time learning his new job. Claimant sought treatment from Dr. John D. Osland in October 2013. Claimant testified Dr. Osland removed the remaining meniscus. According to claimant, once a week for three weeks in February and March 2014, Dr. Osland injected the right knee with Euflexxa, a replacement material containing

¹ ALJ Order at 3-4.

a steroid. The last injection took place on March 25, 2014. Claimant testified he performed his regular job duties and was given no restrictions by Dr. Osland.

On cross-examination, claimant acknowledged that sometime after October 2013, Dr. Osland discussed with him that he had right knee degenerative joint disease and at a future date he might require a total knee replacement.

Claimant indicated that on May 17, 2014, he injured his right knee while operating the sheet extrusion machine. Claimant had to go around the machine to handle a sheet of plastic. He indicated time is important in operating the machine and had there been another employee working with him, it would not have been necessary for claimant to go around the machine to handle the sheet. He testified:

Q. And what happened when you were physically involved with the sheet?

A. I had to reach over, and what I think happened is I hyperextended the knee that I've hyperextended before, and when I stepped off and stepped on the rail, I remember, don't do that again.

Q. And when you stepped on the rail, what if any effect did that have on the sequence of events to your recollection?

A. I was in the process and immediately had to go take care of the rest of the -- to finish the set.

Q. Did you have any sensation involving your knee or your leg as you stepped back?

A. Oh, totally, I knew that there was something that happened. As long as it was going to -- you know, I could keep moving, I kept moving, I mean if you will see, when I fall, I got up really quick and kept moving, I didn't -- I didn't think anything had happened right away, it wasn't until a few minutes later that I realized I had been hurt, and I finished the day.²

Claimant testified that as he was falling, he hit the end of a table with his left shoulder. A video recording shows claimant stumble and fall. However, when he stumbles, claimant's lower legs and feet are obstructed from view by the machine claimant operated. In the video recording, claimant is off the machine and takes several steps before stumbling and falling.

² P.H. Trans. at 30.

Claimant testified he reported the injury by phone to respondent's nurse, who indicated she would check out his injuries on Monday.³ Claimant was referred to Dr. Myron J. Zeller, who saw claimant on May 19, 2014. Dr. Zeller's notes indicated claimant had long-term problems with his right knee. The doctor's notes stated that when claimant was at work on May 17, 2014, his right knee gave out and he fell on his left shoulder. Dr. Zeller assessed claimant with a left shoulder contusion and possible rotator cuff tear. He also indicated claimant had a preexisting right knee condition not covered by workers compensation. Respondent, based upon Dr. Zeller's notes, denied compensability of claimant's injuries.

Claimant sought treatment for his injuries with Dr. Osland. Claimant continued working until June 19, 2014, when he was taken off work by respondent because of restrictions imposed by Dr. Osland. The doctor provided shoulder injections and performed surgery on July 2, 2014. Claimant was released by Dr. Osland on November 13, 2014.

Claimant's medical records for office visits at Via Christi clinics, including those with Dr. Osland, from May 20 through June 16, 2014, were placed into evidence. Dr. Osland's office visit notes prior to May 20, 2014, and after June 16, 2014, were not made part of the record. Dr. Osland's May 20, 2014, notes indicated claimant was following up for right knee degenerative joint disease. The doctor stated: "He [claimant] says his knee had been doing fairly well but on May 17 he was at work and he was getting down off of a machine and he stepped [and] his knee gave way and he fell down. He noted some immediate swelling in his knee but he also injured his shoulder."⁴ The doctor's impression was right knee contusion with swelling and significant arthritis.

On May 29, 2014, Dr. Osland saw claimant again. He noted: "He [claimant] states that when he was getting down off of a machine his knee gave way and he is not sure how he hit his shoulder but he thinks that he landed with his arm reaching out to break his fall and then also at that time he hit his right knee."⁵ A June 10, 2014, left shoulder MRI revealed claimant had a subscapularis tendon tear and a supraspinatus tendon tear, among other things.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

³ May 17, 2014, the date of accident, was a Saturday. Claimant indicated there was no nurse on site that day because it was a Saturday.

⁴ P.H. Trans., Cl. Ex. 1.

⁵ *Id.*

right depends.⁶ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁷

K.S.A. 2013 Supp. 44-508(f)(3)(A) states:

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Respondent asserts claimant’s fall was caused by a personal risk. Respondent asserts preexisting degenerative joint disease in claimant’s right knee caused the knee to give out, causing his fall and left shoulder injury. This Board Member disagrees and affirms the preliminary hearing Order. Dr. Osland’s medical records prior to claimant’s May 17, 2014, accident were not placed into evidence. Dr. Osland did not opine claimant’s right knee degenerative joint disease caused his fall. Dr. Zeller indicated claimant’s right knee injury was not work related, but did not opine his fall was the result of his preexisting knee condition. Claimant testified that after October 2013, his right knee condition caused him to have problems with his steps, but he had not fallen.

There is ample evidence to support claimant’s position that his accident and left shoulder injury resulted from a work risk. When he fell, claimant was performing his job operating a sheet extrusion machine. Claimant testified time was important in performing his job. He was quickly going around the machine he operated to physically handle a sheet of plastic when he stepped on a rail the machine moved on, took some steps and fell down. Claimant testified he hyperextended his right knee, which in turn caused him to fall, striking and injuring his left shoulder. Respondent presented insufficient evidence that claimant’s preexisting right knee condition caused his right knee to give out.

⁶ K.S.A. 2013 Supp. 44-501b(c).

⁷ K.S.A. 2013 Supp. 44-508(h).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, the undersigned Board Member affirms the January 9, 2015, preliminary hearing Order entered by ALJ Marchant.

IT IS SO ORDERED.

Dated this ____ day of March, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
john@fcse.net; dboutz@fcse.net

Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
heathlaw@swbell.net

Honorable Ali Marchant, Administrative Law Judge

⁸ K.S.A. 2013 Supp. 44-534a.

⁹ K.S.A. 2013 Supp. 44-555c(j).